FILE COPY

FILED

SUPREME COURT OF THE UNITED STATES

October Term 1950

No. 916

WILLIAM ANTON WELLS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

HAYDEN C. COVINGTON
Counsel for Petitioner

INDEX

Cases Cited

PAGE

Bridges v. Wixon
326 U. S. 135, 156 19

Cahoon v. United States
152 F. 2d 752, certiorari denied 67 S. Ct. 57, pending on petition for rehearing, No. 183 Oct. Term 1946:
Petition for writ of certiorari 24
Petitioner's reply to Government's memorandum in opposition 24

Eagles v. United States ex rel. Samuels
— U. S. — (No. 59 Oct. Term 1946) decided Dec. 23, 1946 20

Estep v. United States
327 U. S. 114 ..... 11, 23

Falbo v. United States
320 U. S. 549 ..... 22, 23

Follett v. McCormick
321 U. S. 573 21

Helvering v. Bliss
293 U. S. 144 21

Kwock Jan Fat v. White
253 U. S. 454 17

Lehr v. United States
139 F. 2d 919, 921-922 (CCA-5) 21

Morgan v. United States
298 U. S. 468, 479-481 ..... 17, 19-20

Murdock v. Pennsylvania
319 U. S. 105, 106-109, 110, 111, 117 21

Ohio Bell Tel. Co. v. Public U. Comm'n
301 U. S. 292, 304 17

Shields v. Utah-Idaho C. Ry.
305 U. S. 177, 182 17

Stanziale, Ex parte
138 F. 2d 312 (CCA-3) 19

Trinidad v. Sagrada Orden, etc.
263 U. S. 578 21

Tung v. United States
142 F. 2d 919 (CCA-1) 18, 19

United States v. Balogh
— F. 2d — (CCA-2) decided Oct. 31, 1946, pending on petition for writ of certiorari, No. 800 Oct. Term 1946 ..... 10-11, 23, 24

Cases Cited *concluded*

	PAGE
United States v. Estep 150 F. 2d 768 (CCA-3)	12-14
United States v. Lair 52 F. Supp. 393 (DC-ND-Calif.)	19
United States v. Peterson 53 F. Supp. 760 (DC-ND-Calif.)	19
United States ex rel. Flakowicz v. Alexander — F. Supp. — (DC-Conn.) decided Dec. 4, 1946	24
United States ex rel. Hull v. Stalter 151 F. 2d 633 (CCA-7)	20
United States ex rel. Kulick v. Kennedy 157 F. 2d 811 (CCA-2)	17-18
United States ex rel. Trainin v. Cain 144 F. 2d 944, 949 (CCA-2)	21

Statutes and Regulations Cited

Judicial Code, sec. 240 (a) as amended by Act of Feb. 13, 1925	1
Regulations, Selective Service (32 C. F. R. 601.5 *et seq.*) sections—	
615.82	2, 15
622.44	2, 11
622.51	2
623.1	2, 11
623.2	2, 15
625.1	2
625.2	2, 15
626.1	2
626.2	2
626.3	2
627.13	2, 11, 15
628.1	11
629.1-629.35	2
662.15	2, 22
Rules of Criminal Appeals, Rules XI and XIII (May 7, 1934)	1
United States Code, Title 50, App. secs. 301-318 ["Selective Training and Service Act of 1940" as amended, sections—]	
3 (a)	2
5 (c) (1)	11
5 (d)	2, 21
10 (a)	2
10 (a) (2)	11
11	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No.

□

WILLIAM ANTON WELLS, *Petitioner*
v.
UNITED STATES OF AMERICA, *Respondent*

□

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

William Anton Wells petitions this court for a writ of certiorari. He shows unto the court as follows:

1. *Opinion of the court below.*

The opinion of the United States Circuit Court of Appeals is not reported. It appears in the record. [84-94] *

2. *Jurisdiction.*

The jurisdiction of this court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this court on May 7, 1934.

* Bracketed figures appearing in this petition refer to pages of printed transcript of record.

3. *Timeliness of this petition.*

Judgment of affirmance was rendered and entered December 23, 1946. [94-95] This petition for writ of certiorari is filed within thirty days from the date of such judgment.

4. *Statutes and Regulations involved.*

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. §§ 301-318) are drawn in question here, as well as Sections 615.82, 622.44, 622.51, 623.1, 623.2, 625.1, 625.2, 626.1, 626.2, 626.3, 627.13, 629.1-629.35, 662.15 of the Selective Service Regulations (32 C.F.R. Supp. 615.82 *et seq.*) promulgated by the President under said Act.

5. *Questions presented.*

(1) Did the court below err in failing to hold that the draft board order supporting the indictment was void, because the local board failed to make a record of the oral evidence given by petitioner's father to corroborate petitioner's claim that he was exempt as a minister of religion which was considered by the local board in arriving at petitioner's classification, thereby depriving him of a full and fair hearing before the board of appeal, contrary to the due process clause?

(2) Did the court below err in failing to hold that the draft board order supporting the indictment was void because the local board, in preparing a memorandum of some of the testimony for the use of the board of appeal, incorporated therein arguments, opinions and statements prejudicial to petitioner, contrary to the Regulations, thereby depriving petitioner of a full and fair hearing before the board of appeal, contrary to the due process clause?

(3) Did the court below err in holding that the violations of petitioner's rights of procedural due process could not be considered upon his appeal because they arose before the first order to report for induction, made the basis of

petitioner's first conviction, which conviction was thereby *res judicata* of the procedural due process questions presented by petitioner?

(4) Did the court below err in failing to order the indictment dismissed because the undisputed evidence showed that the administrative agency, at the time of the final classification, arbitrarily and capriciously denied petitioner his claim for exemption as a minister and classified him as liable for training and service without basis of fact?

(5) Did the court below err in failing to hold that the trial court should have granted petitioner's motion for judgment of acquittal presented at the close of all the evidence, because the undisputed fully-developed evidence showed that the order supporting the indictment was void?

(6) Did the court below err in holding that the order of the draft board was valid and there was no proof showing that the board was biased or prejudiced against petitioner or that its action was arbitrary, when the undisputed evidence showed that the board failed to allow petitioner his rights of procedural due process?

Statement of Case

Form of Action

This criminal action was instituted in the District Court of the United States for the Western District of Texas by return of an indictment charging petitioner with violation of Selective Training and Service Act of 1940 as amended, and the regulations thereunder. [1]

The indictment charged that petitioner was a person required to comply with the provisions of the selective service law, and that he unlawfully and knowingly failed to report and submit himself to induction into the armed forces of the United States, in accordance with the order of the local board. [1-2]

Thereafter petitioner pleaded "not guilty". [4] A trial

by jury was waived [3], and the Government presented its case to the court and rested. [28] At the close of all the evidence the court found the petitioner guilty as charged in the indictment [66], and entered final judgment on March 6, 1946, committing him to the custody of the Attorney General to be imprisoned for a period of three years in an institution of the penitentiary type. [68-70]

Thereafter petitioner duly filed his written notice of appeal in the manner and time required by law. [70-71]

Thereafter petitioner's case was duly submitted to the court of appeals upon briefs and oral argument for decision. [84] The court affirmed the judgment. [84-94] Each and every one of the grounds raised in this petition for certiorari was presented to the courts below.

Facts

Petitioner, now 23 years of age, registered under the Selective Training and Service Act of 1940 with Local Board No. 1 for Leon County, Texas, and was assigned Order Number 11281. [7] He filed a Selective Service Questionnaire with the local board on November 30, 1942. [5] In series VIII of his questionnaire he stated he was a minister of religion, and had been a minister of Jehovah's witnesses since November 1939. [12] He filed several statements over his signature [13-16, 20] and an affidavit from R. L. Petty stating petitioner was an ordained minister of the gospel. [31-32]

On January 25, 1943, the local board received a written communication from petitioner stating he desired to appeal. [61] Instead of preparing the record for appeal, the local board immediately issued a subpoena commanding petitioner to appear before the local board on January 26, 1943. [61] He and his father appeared, [16] and, supporting petitioner's proof, discussed at length petitioner's training for and activity in ministerial work. [46] The records of

the local board show that L. B. Bing, chairman, and B. D. Brown, secretary, were present at this appearance.*

The clerk of the local board, when first called by the Government, testified that none of the oral testimony heard and considered at the time petitioner and his father appeared before the local board and testified concerning petitioner's ministerial status was summarized in writing and placed in petitioner's file, and that the board of appeal was never given the benefit of this testimony in passing upon petitioner's claim as a minister of religion. [16, 17, 18]

The undisputed evidence showed that the local board had made an investigation among the neighbors of petitioner, as well as interviewed "the people in and around Marquez, Texas", including "former students of the Marquez Public School", all of whom said that petitioner was not considered by them to be a minister. [62-63] None of the names of the persons interviewed or the substance of the testimony received from the persons interviewed was reduced to writing. Merely the ultimate effect of the testimony in the form of a conclusion stated by the local board was reduced to writing. [62-63]

Upon such personal appearance before the local board, petitioner discussed with them the reasons why he should be classified as a minister. [43] He explained to them fully how he performed his missionary evangelistic work from house to house and place to place, which was his chief occupation. [46] He showed that he had been ordained as a minister by Almighty God. [51] He showed that, although he did not have a fixed congregation that attended a church house to hear him preach, he nevertheless preached as a missionary evangelist from house to house and door to door in the missionary field assigned to him by the legal governing body of Jehovah's witnesses: the Watchtower Bible and Tract Society. [51-52]

* Petitioner testified that Mr. Bing and Mr. Hill, members, Mr. Haley, clerk, and Mr. Brown, secretary, were present. [43]

For the purpose of receiving corroborating evidence supporting petitioner's testimony and claim for exemption, petitioner's father was permitted to appear before the local board, through its "graciousness". [15-17] Petitioner's father submitted oral evidence concerning petitioner's ministerial status which was never reduced to writing and put in petitioner's file. [17-18] When the record was prepared for the board of appeal, none of the oral evidence offered by petitioner's father was reduced to writing. [17-18] * The Board heard petitioner's father and considered what he had to say. [17] The testimony of the father and a considerable portion of the testimony of the petitioner offered to the local board upon his personal appearance was not reduced to writing and submitted to the board of appeal. [17-18]

At the personal appearance, Mr. Bing, the chairman of the local board [63] stated that "he did not consider Jehovah's witnesses as ministers, and that the Board was not going to classify any of them as 4-D, and they would classify them 1-A". [43]

Accordingly the local board, having denied his claim for exemption as a minister of religion on January 19, 1943, allowed his appeal from the classification which made him liable for training and service in the armed forces. [5] The local board did not consider his case, as required by the Regulations, upon personal appearance. The local board did not continue his classification in Class I-A. It did not mail to him a new classification advice. The local board immediately merely prepared and forwarded to the board of appeal the file of petitioner in which appeared its extensive written argument against the claim of petitioner contrary to the Regulations in a purported memorandum of the

* The clerk testified that the father's evidence would not have been admissible. [17] It is interesting to observe, however, that the hearsay testimony of the people in and around Marquez and petitioner's neighbors was considered admissible by the local board and relied upon by the local board in denying petitioner his claim for exemption. [62]

testimony received by the local board upon the personal appearance of petitioner. [61-63]

On February 3, 1943, the board of appeal placed him in Class I-A, where he remained until ordered to report for induction on June 18, 1943. [6, 18]

Except for the hearsay evidence from neighbors [62-63], there was no evidence in his file disputing the evidence and claim that he was a duly recognized minister of religion, representing a religious organization known as Jehovah's witnesses and, as its legal governing body, the Watchtower Bible and Tract Society. There was no evidence that petitioner did not fit, as a minister of religion, Opinion Number 14 of National Headquarters of Selective Service System concerning the ministerial status of Jehovah's witnesses; that he did not stand in relation to Jehovah's witnesses in the same way that the recognized orthodox clergy stand toward their congregations; that he did not perform ceremonies that are ordinarily performed by ministers of religion under the Act. This was freely admitted by the draft board officials who had handled his case. [3-67]

On June 23, 1943, petitioner wrote the local board a letter in which he referred to the facts already presented to the local board in support of his claim for a ministerial classification, and called their attention to the provisions of the Selective Service Regulations in his behalf. He also informed the board that he had but one alternative, which was to obey God rather than man, and that he could not report for any kind of military service and training. [14-16]

For his refusal to comply with the local board's order to report and submit to induction, he was indicted, tried and convicted for violating the Selective Training and Service Act, and on November 18, 1943, sentenced to serve two years in a penitentiary-type institution to be designated by the Attorney General, and after serving twenty months was released on conditional parole. [9, 67]

On October 12, 1945, following petitioner's release from

prison upon parole, he was given a preinduction physical examination, pursuant to an order to report for such, and found physically and mentally acceptable for military training and service by the armed forces. [10, 28-29] Whether petitioner appealed or not does not affirmatively appear from the record, but in any event his case was forwarded to the board of appeal some time prior to November 20, 1945. [21] The record shows that on November 20, 1945, the board of appeal again classified him in Class I-A. [21, 24] The local board mailed to petitioner written notice of the classification given him by the board of appeal on December 4, 1945, which was only three days before they mailed him the order to report for induction at Centerville, Texas, on December 17, 1945. [63, 6-7]

Inasmuch as petitioner had been declared to be acceptable upon a preinduction physical examination within ninety days from the date he was ordered to report for induction, he would not be required to undergo a complete re-examination, according to his Certificate of Fitness. [28-29] *

A request of petitioner for an appeal to the State Director of Selective Service and for a delay of induction proceedings was denied by the local board, and the order to report for induction issued by the board on December 7, 1945, was permitted to stand. [24]

The clerk of the local board testified that there was no evidence in petitioner's file indicating that he had an occupation other than that of a minister or preacher of religion. [20] He also testified that the only reason petitioner was denied class IV-D as a minister of religion, and placed in class I-A, available for combatant military service, by the

* Although the order to report for induction stated that petitioner would be examined upon reporting for induction [7-8], it should be observed that this was an old form used by the Selective Service System before the Regulations were amended pursuant to the Amendment of the Act in December 1943. Therefore, the statements about examination upon reporting and making arrangements with the employers [7-8] are *ultra vires* and cannot be taken as indicating that petitioner had not exhausted his administrative remedies by reason of the preinduction physical examination.

board, was because his name did not appear on the list of Jehovah's witnesses on file with the State Director of Selective Service. [20] The letter from the State Director to the local board revealing this information was received in evidence as Defendant's Exhibit 7. [39, 40] It was this information, received by the board in 1942, that prompted the board to reject petitioner's claim as a minister in 1945, according to the testimony of the clerk. [20, 25-26]

How Issues Raised

On receipt of his final classification, petitioner notified the local board of his desire to appeal to the State Director of Selective Service, and requested the board to withhold induction proceedings until his case could be reviewed by the State Director. This notice and request were mailed to the local board on December 11, 1945, and received and filed by the board on December 14, 1945, and were offered in evidence, but not admitted, as Defendant's Exhibit 6. [37, 38]

In support of his position that he had been arbitrarily and unjustly classified, and was entitled to a review by the State Director of Selective Service to avoid an injustice, petitioner enclosed with his notice of appeal to the State Director two statements from ministers of his own faith setting forth the facts that he was a minister of Jehovah's witnesses and so regarded by other members of the same faith. These statements were likewise received by the board and filed December 14, 1945, and were offered in evidence as Defendant's Exhibits 4 and 5, but not admitted. [33-36]

At the close of all the evidence petitioner moved for a judgment of acquittal. [66] The court, in convicting the petitioner, overruled his motion. [66-67] Each of the grounds urged upon this petition for writ of certiorari was considered by the court below in affirming the judgment of conviction. [84-94]

Specifications of Error

The Circuit Court of Appeals for the Fifth Circuit erred—

(1) in affirming the judgment of conviction;

(2) in failing to order the judgment reversed and the indictment dismissed; and

(3) in failing to reverse the judgment and order a new trial.

Reasons Relied on for Granting the Writ

The decision of the court below that the statements of the chairman of the local board showing prejudice against Jehovah's witnesses was not sufficient to justify dismissal of the indictment is directly in conflict with the holding of the Second Circuit Court of Appeals in the case of *United States* v. *Balogh*, No. 800, October Term 1946. The petition for writ of certiorari is pending before this court in the *Balogh* case undetermined.

In the *Balogh* case, the Second Circuit Court of Appeals said: "The concluding remarks of the chairman of the local board show that he at least did not understand his duties in the spirit of these directions. He was condemning Jehovah's Witnesses as a whole, when he said that all that 'you are interested in is evading the service of your country'. Had this been a conclusion addressed to Balogh individually, the result of an impartial appraisal of his personal refusal, it might indeed have been immune from attack in the courts. It was not; it was a conclusion denying the exemption to Balogh because of his membership, and not professing to detect him personally as a sham. We should for that reason hesitate to accept the denial of the exemption, made as it was in that humor, even if the record were otherwise without flaw; but it is not."

Substantially the same statement was made by the chairman of the local board in the case at bar, when he said

that "he did not consider Jehovah's witnesses as ministers, and that the Board was not going to classify him as 4-D, and they would classify them 1-A". [43] Consequently, since this question is now before the court in the *Balogh* case, this court should grant the petition in this case.

Moreover, the holding of the court below that the statements of prejudice on the part of the local board did not invalidate the order supporting the indictment is out of harmony with the dictum of this court in *Estep* v. *United States*, 327 U. S. 114, where it was said: "If a local board ordered a member of Congress to report for induction, or if it classified a registrant as available for military service, because he was a Jew, or a German, or a Negro, it would act in defiance of the law. . . . its action would be lawless and beyond its jurisdiction." (Sections 10 (a) (2) 5 (c) (1) of the Act; Sections 623.1 and 622.42 of the Regulations.)

Furthermore, this is an important question of federal law which should be but which has not been directly decided by this court. It should be now passed upon and decided in this case.

The Selective Service Regulations specifically restrain the local board from incorporating any argument or making any statement of opinion with reference to the classification given a registrant in the written summary prepared for the consideration of the board of appeal: "If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts. In preparing such a summary, the local board should be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision." Regulation 627.13 (b).* The local board admittedly violated this regula-

* The local board is again warned by the Regulations (628.4) in similar vein in the event it is necessary to prepare the file for transmission to the President on a presidential appeal.

tion when it prepared the record for forwarding to the board of appeal. [61-63]

This question has not been directly passed upon by any federal court. However, the dissenting opinion of Judge Biggs in *United States* v. *William Murray Estep,* 150 F. 2d 768, discusses the question. Judge Biggs holds that this type of violation is a deprivation of registrants' rights of due process requiring the dismissal of the indictment. See his dissenting opinion, where he said:

"On July 28, 1944, Estep's file was forwarded to the appeal board. It was accompanied by a letter written by an assistant clerk of the local board to the appeal board. The letter was received in evidence. It states in part, 'Mr. Estep is not listed as a minister in any list yet submitted from National Headquarters of Selective Service. Although this registrant is not gainfully employed and devotes his time to the ministry, he does not contribute enough hours to this work to be considered a full-time minister since he works only three days a week in that capacity and is not justified to a 4-D classification.' . . .

"One final question relating to the Regulations remains for discussion. Section 627.13 (b) provides in part, 'In preparing . . . a summary [of the written information in the registrant's file], the local board should be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision.' The letter of July 28 written by the assistant clerk of the local board to the appeal board . . . violated this section. The letter was argumentative and contained expressions of opinion as to the information in the registrant's file. The regulation states that the local board 'should be' careful to avoid the expression of opinion and 'should refrain' from including any argument in support of its own decision and that other portions of Section 627.13 and the Regulations generally use the auxiliary verb 'shall'. But the auxiliary verb 'should'

should not be considered as merely precatory.* It was the intent of the framers of the Regulations by Section 627.13 (b) to make certain that an appeal board in considering the classifications of a registrant would embark upon that consideration unaffected by any observation, opinion, or argument of a local board. The Selective Service Regulations were intended to have and do have the effect of law. See *Smith* v. *Richart* (D. C. E. D. S. C.) 53 F. Supp. 582; *United States* v. *Reckord* (DCDM) 51 F. Supp. 507, 510-513; *United States* v. *Downer* (CCA-2), 143 F. 2d 125. For analogy see *United States* v. *Eliason Administratrix,* 16 Pet. 291, 302; *Nordmann* v. *Woodring,* 28 F. Supp. 573, 576. Cf. *Standard Scale Co.* v. *Farrell,* 249 U. S. 571, 577.

"It may be argued that Estep has not shown that his cause was prejudiced before the appeal board by the letter of July 28. Such an argument is not entitled to weight. The selectee at his trial should not be permitted to bring the members of an appeal board before the court to show the basis of their classification of him. The President, authorized by Section 10 of the Selective Training and Service Act to prescribe the necessary rules and regulations to carry out the provisions of the Act, delegated this duty to the Director of Selective Service who promulgated the Selective Service Regulations. See Executive Order No. 9410, of December 23, 1943, 8 F. R. 17, 319. The agency charged with the administration of the Act promulgated the regulation with which we are presently concerned. From its terms, the conclusion is irresistible that the Director determined that the expression of opinion or argument in support of its decision by a local board to an appeal board might prove prejudicial to a registrant. We should not look behind this ruling. I conclude therefore that the action of the clerk of the local board in sending the letter of July 28 to the

* "Webster's New International Dictionary states, '*Should* is everywhere used in the same connection and the same senses as *shall,* as its imperfect.' "

appeal board for consideration of its contents constituted a denial of due process of law to Estep. . . .

" . . . A pure question of law arose in the case at bar in respect to the letter of July 28, 1944, admittedly sent by the local board to the appeal board. For analogy see *United States* v. *Reckord,* 51 F. Supp. at p. 510.* Because of the letter of July 28, 1944, the trial court should have directed a verdict in favor of the defendant. If it were not for what I deem to be the legal effect of the letter, I would conclude that this court should reverse the judgment and remand the cause for a new trial in order that the other questions which I have referred to might be determined after submission of the rejected evidence. In view of the letter of July 28 it would be futile to order a new trial in the case at bar."

Therefore this constitutes a substantial question of federal law which has not been heretofore decided by this court but which should be now determined in this case.

The undisputed evidence shows that the local board considered hearsay oral evidence gathered in its *ex parte* examination of the people who lived in and around Marquez, Texas, and the neighbors of petitioner. [62] Although the substance of this testimony was not reduced to writing the ultimate effect and conclusions placed upon such hearsay evidence was recorded in the file. [61-63] This hearsay testimony was considered by the local board. [61-63] Upon his personal appearance before the local board petitioner brought along his father to give testimony to corroborate his evidence. This oral evidence was received and considered by the local board. [16-18] In preparing the record for the board of appeal, the local board should have reduced to writing the testimony of the father given to the local board

* "Judge Chestnut stated, 'My *conclusion of law* is that the action of the Local Board in intentionally disregarding the applicable regulation and directive and thus including the petitioners in the July quota list was legally arbitrary and capricious; and the petitioners are entitled to be . . . released from custody.'"

in the same manner that it reduced to writing the hearsay testimony given orally to the board by other third persons. (Reg. 623.2)

The Regulations require that the local board reduce to writing and place in the registrant's file all oral evidence submitted by him pertaining to his occupational status and classification. Section 615.82 provides, *inter alia*, "Every paper pertaining to the registrant, except his Registration Card (Form 1) . . . shall be filed in his Cover Sheet (Form 53)."

"The registrant's classification shall be made solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file; . . . Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file." (Section 623.2. See also Section 625.2 (b), Regulations.)

"If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts." (Section 627.13 (b))

Section 627.13 (b) of the Regulations required the local board to "carefully check the registrant's file to make certain that all steps required by the regulations have been taken and that the record is complete." The local board disregarded the regulations and acted in complete defiance thereof, thus flouting the law and showing utter contempt for the defendant's right under the regulations.

The regulations intend that the classification upon appeal shall be *de novo*. The board of appeal does not have an opportunity to permit the registrant to appear before it personally; it is confined in its consideration to the record made in writing. If the local board did not comply with the regula-

tions requiring it to make a full record of all the facts and evidence considered by it, the appeal agency of the Selective Service System would be entirely at the mercy of the local board. If a record was not made of all the facts and evidence which properly entered into the judgment of the local board, then the board of appeal would not be in as good a position to pass on the case as was the local board. The regulations contemplate that the local board shall make a record of all the evidence considered by it so that the board of appeal shall be in equally as good a position to pass upon the classification of a registrant as the local board.

The undisputed evidence showed that the local board failed to reduce to writing and place in the petitioner's file all of the vital oral evidence and especially that of his father submitted at his personal appearance relative to his status under the Act. When he was at the hearing his father offered additional oral evidence which was concededly received and considered by the local board. The local board, although it did hear the oral evidence, did not reduce it to writing and place it in the cover sheet as required by the Regulations. The board of appeal did not see or have an opportunity to consider all the additional evidence. It did not know of the action of the local board in withholding vital oral evidence received and considered.

The classification of I-A was affirmed or continued *de novo* solely because the local board failed to include the new oral evidence in the cover sheet. It must be conclusively presumed that the classification of the petitioner would have been different and he would as a minister have been exempted from training and service had the local board complied with the Regulations and included a summary of his oral evidence in the file.

"There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when the minimal requirement has been neglected or ignored." CARDOZO, *J., Ohio Bell Tel.*

Co. v. *Public U. Comm'n,* 301 U. S. 292, 304. See, also, *Shields* v. *Utah-Idaho Central Ry.,* 305 U. S. 177, 182.

"Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. . . . If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." *Morgan* v. *United States,* 298 U. S. 468, 479-481.

In *Kwock Jan Fat* v. *White,* 253 U. S. 454, the administrative agency omitted and suppressed testimony of important witnesses favorable to the applicant. On appeal to the Commissioner of Immigration, the administrative determination was affirmed. In spite of the fact that Congress had given great power to the Secretary of Labor in the exclusion of Chinese immigrants, the court said:

"It is a power to be administered not arbitrarily and secretly, but fairly and openly under the restraints of the traditions and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts in proceedings for review to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information not less of the Commissioner of Immigration and of the Secretary of Labor than for the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural-born citizen of the United States should be permanently excluded from his country."

The position here taken is supported by the decisions of the United States Second Circuit Court of Appeals in *United States ex rel. Kulick,* appellant, v. *Kennedy, Warden,* 157 F. 2d 811, opinion by Judge Learned Hand. In the *Kulick* case the facts with respect to the failure to reduce

to writing the evidence given at the hearing before the local board on personal appearance were substantially the same as in this case. What the court said in the *Kulick* case would be applicable in this case. In its *Kulick* opinion the court said:

"At that time he submitted an affidavit and a written statement, asserting that he was a 'regular or ordained minister' of Jehovah's Witnesses; and he testified at length. (There was no stenographer present, and the only record of what he said is his own testimony at the trial and that of one member of the board whom he then called.)"

"He appeared on the 11th, but there is no record of what took place except that his classification was not disturbed."

"Be that as it may, in the case at bar that was not the sum of what Kulick showed, and tried to show, and incidentally, as we have said, the record before the board did not preserve any testimony there taken. Surely it can never be tenable to make critical what chances to be preserved in that record. Evidence is no less evidence because it is not recorded; and anything which in fact tends to establish that the accused did not have a fair hearing must be available in support of his defense, from whatever source it comes."

The withholding of evidence by the local board denied the final and real classifying agency of the Selective Service System the right to a full review of petitioner's case. The act of the local board was tantamount to a denial of the right of appeal. It is a denial of procedural due process so as to make the order upon which the indictment is based void and the same as though no order had been issued. Under these circumstances the court below should have held that the illegality of the order was ground for a dismissal of the indictment and a remand of the case to the Selective Service System. *Tung* v. *United States* (CCA-1) 142 F. 2d 919. The decision of the court below conflicts directly with the *Tung* decision. Cf. *United States* v. *Peterson* (DC-ND-Calif.)

53 F. Supp. 760; *United States* v. *Lair* (DC-ND-Calif.) 52 F. Supp. 393; *Ex parte Stanziale* (CCA-3) 138 F. 2d 312. It should be observed in the *Tung* case that the Government accepted the decision of the First Circuit as the law by not applying for certiorari, which was available to it.

There is no escape from the fact that the hearsay evidence of neighbors and the prejudicial statements of the local board were considered by the board of appeal which influenced the decision by that agency. To what extent, it is impossible to say. This brings the case squarely within the rule of *Bridges* v. *Wixon,* 326 U. S. 135, 156, where it is said:

" . . . The alien does not prove he had an unfair hearing merely by proving the decision to be wrong . . . or by showing that incompetent evidence was admitted and considered. . . . But the case is different where evidence was improperly received and where but for that evidence, it is wholly speculative whether the requisite finding would have been made. Then there is deportation without a fair hearing. . . . "

The reception of improper evidence was one of the things condemned by this Court in *Morgan* v. *United States,* (1936) 298 U. S. 468, 479-481, wherein the Chief Justice Hughes said:

" . . . It is a duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. . . . Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. . . .

" . . . The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the

one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

Whether a hearing is fair must be determined by the character of the hearing and not by that of the classification based thereon. This question is open in full judicial inquiry and is in no sense concluded by assertion of the administrative agency in question that a fair hearing was given. In this case the undisputed evidence before the lower court showed that the appeal board had received grossly incompetent and prejudicial evidence. Thus it was the duty of the trial court to instruct the jury to acquit petitioner.

The statements of the local board and the illegal evidence were illegally considered and judged by the draft boards in the case and therefore vitiated the entire proceedings. This being a criminal case, it being shown that the boards actually considered the evidence, and the presumption of innocence being a stronger presumption than the presumption of legality of the administrative proceedings, it cannot be here held that the presumption that was relied upon in the case of *Eagles* v. *United States ex rel. Samuels* (No. 59, October Term 1946, decided by the court on December 23, 1946) can be invoked.

The failure of the court below to hold that there was no basis in fact for the classification given petitioner who, at all times while his case was before the boards, was a minister, and the failure to hold that, in denying his claim for exemption the board acted arbitrarily and capriciously, is in direct conflict with the holding of the United States Seventh Circuit Court of Appeals in *United States ex rel. Hull* v. *Stalter,* 151 F. 2d 633, where the facts are substan-

tially the same as those in the case at bar. Moreover, the holding of the court below is out of harmony with the dictum expressed on the same question in *Lehr* v. *United States* (CCA-5) 139 F. 2d 919, 921-922, and in *United States ex rel. Trainin* v. *Cain* (CCA-2) 144 F. 2d 944, 949. The holding of the court below in refusing to revoke the action of the draft boards against petitioner who was preaching as a minister is directly in conflict with decisions of this court in *Murdock* v. *Pennsylvania* (1943) 319 U. S. 105, 106-109, 110, 111, 117, and *Follett* v. *McCormick*, 321 U. S. 573, where the facts in reference to the ministerial activity were identical with the facts in this case. In those decisions this court held that the activity of Jehovah's witnesses occupied the same high estate as does orthodox preaching from the pulpit. Furthermore, the court held that the preaching activity of Jehovah's witnesses was more than preaching. It was a combination of pulpit preaching and evangelism.

The narrow orthodox construction placed upon the terms of the Act and Regulations providing for exemption of ministers of religion is a decision on an important question that is probably in conflict with the applicable decisions of this court. *Trinidad* v. *Sagrada Orden de Predicatores de la Provincial del Santisimo Rosario de Filipinas*, 263 U. S. 578; *Helvering* v. *Bliss*, 293 U. S. 144.

There are important questions of federal law presented upon this petition which have not been but which should be settled by this court.

In determining whether or not the trial court erred in refusing the motion for judgment of acquittal, it is necessary for this court to consider definition of the terms "regular minister of religion" and "duly ordained minister of religion" used in Section 5 (d) of the Act. (54 Stat. 885, 50 U. S. C. App. § 305) In this connection the court is required to determine (1) whether a broad and liberal interpretation should be placed upon the ministerial exemption

in the Act so as to include the regular and duly ordained ministers of every recognized religious organization in the United States, or (2) whether a narrow interpretation should be placed upon the Act confining the exemption to only such ministers as come within the definition of ministers of religion according to standards and precepts of the popular orthodox sects and denominations.

Additionally there is presented an extraordinary novel question of administrative law not heretofore determined but which should now be determined by the court in this case. The court below held that, inasmuch as the violations of procedural due process by the local board, in failing to reduce to writing the oral evidence received and considered by it and in making the statements, written and oral, showing prejudice on the part of the local board, occurred before the first order to report for induction was issued, such violations could not be considered upon the trial of the indictment in this case, because upon the former trial it was conclusively adjudicated that such violations of procedural due process did not invalidate the order. [84-94] *

Moreover the court below held that the subsequent classifications given petitioner by the special prison panel board as well as I-A classification given him by the board of appeal in November 1945, cured any error of procedural due process committed by the local board. [84-94] The court held that during his original incarceration the petitioner was subject to the special prison panel. [84-94] Regardless of this fact he was nevertheless reclassified by the local board and the board of appeal upon his discharge from prison. (Reg. 662.15) But irrespective of this, the board of appeal classified petitioner upon the record submitted to it. The record submitted was not complete because of the

* It should be observed that upon the former trial the rule of Falbo v. United States, 320 U. S. 549, applied and the petitioner was convicted because he failed to exhaust his administrative remedies, rather than that the actions of the local board were valid.

defalcation of the local board in failing to make a proper record and also in violating petitioner's rights to procedural due process. The mere fact that the prison panel may have classified petitioner in Class IV-F (morally unacceptable) while he was in prison does not in any way validate the procedural violations committed by the local board. Petitioner was entitled to have the board of appeal pass upon his case with a full and complete record, which it did not have, and without poisonous prejudicial statements originally injected by the local board, which remained in his file when his case was finally reconsidered and he was reclassified by the board of appeal.

The petition for writ of certiorari should not be dismissed because it may appear that the petitioner did not exhaust his administrative remedies by failure to report for induction. The court below properly held that the case of *Estep* v. *United States* (327 U. S. 114) applied, rather than *Falbo* v. *United States* (320 U. S. 549).

The facts in this case are somewhat similar to those involved in *United States* v. *Balogh* (No. 800, October Term 1946) now pending on petition for writ of certiorari. However, the facts in this case with respect to the exhaustion of administrative remedies are stronger than the facts in the *Balogh* case. Balogh was accepted upon a preinduction physical examination more than four months prior to the order to report for induction issued. Wells, in this case, was accepted upon a preinduction physical examination within ninety days prior to the issuance of the order to report for induction. According to the Regulations and the Certificate of Fitness he was not subject to a complete reexamination if presented for induction within ninety days of the date of his acceptance on October 8, 1945, [28-29] since petitioner was ordered to report on December 17, 1945.

It must be conclusively presumed that he would not be reexamined but that "'All had been done which could be done' by Flakowicz. The date of induction had arrived. True,

the language of the *Falbo* and *Billings* cases appears to require actual reporting at the induction center. Yet both cases involved registrants ordered to report under the system in force prior to the Congressional provision of pre-induction physical examinations and the amendment to the regulations to conform to the Congressional directive. [¶] The United States Supreme Court has not passed directly upon the state of facts presented in Flakowicz's case. We may not consider the denial of certiorari as an affirmance. [¶] Flakowicz had taken every possible step in the administrative process. On the morning of March 8, 1944, nothing had been done by the board or the director of Selective Service to reopen his classification or postpone his induction. The only function to be performed on that morning was submission to induction. Under those circumstances the Court will not require the empty gesture of reporting and refusing in person, instead of refusing by letter, in order to allow a testing of the legality of the classification." *United States ex rel. John Flakowicz* v. *Myrl E. Alexander, Warden,* Judge J. Joseph Smith (USDC-Conn., decided December 4, 1946).

This matter has been exhaustively discussed by counsel for petitioner in the petition for writ of certiorari and petitioner's reply to the Government's memorandum in opposition filed in *Cahoon* v. *United States,* No. 183, October Term 1946, and respondent's memorandum in opposition to the petition for writ of certiorari filed in *United States* v. *Balogh,* No. 800, October Term 1946. Reference is here made to such documents to show that the court below properly considered the case upon the merits and that this court should accordingly grant the petition for certiorari and consider each of the questions presented upon this petition for writ of certiorari.

In any event, inasmuch as the questions presented in *United States* v. *Balogh,* No. 800, October Term 1946, are similar to the question of whether or not the petitioner in this case exhausted his administrative remedies, then for

such reasons as would warrant the granting of the writ in the *Balogh* case, the petition for writ of certiorari should be granted in this case.

WHEREFORE, your petitioner prays that this court issue a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit directing such court to certify to this court for review and determination on a day certain to be therein specified, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and petitioner further prays that the judgment of said Circuit Court of Appeals, affirming the judgment of conviction entered by the District Court, be here set aside and petitioner dismissed from custody or, in the alternative, the judgment be reversed and the cause remanded for a new trial consistent with this court's opinion; and that your petitioner be granted such other and further relief in the premises as to this court may seem just and proper in the circumstances.

WILLIAM ANTON WELLS
Petitioner

By HAYDEN C. COVINGTON
Counsel for Petitioner